REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 162 OF 2014

DAVID MUSYA MAKAU..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From original conviction and sentence in Criminal Case Number 164 of 2013

in the Senior Resident Magistrate's Court at Wundanyi delivered

by Hon M. Chesang(Ag RM) on 11th September 2013)

JUDGMENT

INTRODUCTION

1. The Appellant herein, David Musya Makau, was tried and convicted by Hon C. Chesang, Ag Resident Magistrate for the offence of attempted incest contrary to Section 20 (2) of the Sexual Offences Act No 3 of 2006 and sentenced to twenty (20) years' imprisonment. He had also been charged with the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the said Act.

2. The particulars of the main charge were as follows :-

> **"On the 11th Day of December 2010 at [particulars withheld] Village in Mwatate within Taita Taveta County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of L M a girl aged 4 years who to his knowledge was his niece."**

ALTERNATIVE CHARGE

> **"On the 11th Day of December 2010 at [particulars withheld] Village in Mwatate within Taita Taveta County, intentionally and unlawfully touched the vagina of L M a girl aged 4 years with his penis."**

3. Being dissatisfied with the judgment therein, on 12th November 2013, the Appellant filed a Notice of Motion application to be allowed to file an appeal out of time at the High Court of Kenya at Mombasa, which application was allowed and his Appeal deemed as duly filed and served. The Grounds of Appeal were as follows:-

1. **THAT the learned trial magistrate erred in law and fact by failing to note guilty to the charges** (sic)**.**

2. **THAT the learned trial magistrate erred in law and fact by failing to note the maternal** (sic) **particulars as enshrined in the charge did not confirm** (sic) **with the evidence on record.**

3. **THAT the trial magistrate erred in law and fact by failing to appreciate that evidence of all witnesses contradicted and could not warrant for a conviction** (sic)**.**

4. **THAT the learned trial magistrate erred both in law and fact by failing to note that essential witnesses were not called to prove the said offence i.e. the doctor and P3 Form.**

5. **THAT the judgment of the subordinate court was against the weight of evidence in records** (sic)**.**

4. The Appeal herein was subsequently transferred to High Court of Kenya, Voi. On 19th July 2016, the court directed him to file his Written Submissions. Instead of doing so, on 9th September 2016, he filed Written Submissions along with Amended Grounds of Appeal. The grounds of appeal were as follows:-

1. **THAT the trial magistrate erred in law and fact by finding that the minor's evidence was competent enough without seeing that the reason of the voire dire examination on record was improper- Sect. 124 of the C.P.C.** (sic).

2. **THAT the learned trial magistrate erred in law and fact by appreciating the charges that as per the reason on record the charges were non-existing** (sic).

3. **THAY the learned trial magistrate erred in law and fact by upholding that the charge was proved by the evidence of PW 3 and PW 4 on his sentencing** (sic).

4. **THAT the honourable magistrate erred in law and fact by not considering the importance of the Investigation Officer during his conviction.**

5. **THAT the learned trial magistrate erred in law and fact by failing to appreciate the evidence of PW 1 and PW 2 without seeing that the minors were contradicted their allegations** (sic).

6. **THAT the honourable trial magistrate erred in law and fact by not considering his defence submissions on his sentencing.**

5. The State's Written Submissions were dated 27th September 2016 and filed on 28th September June 2016. In response to the State's Written Submissions, the Appellant filed Further Submissions on 8th November 2016.

6. When the matter came up on 8th November 2016, both the Appellant and the State requested this court to render its decision based on their respective Written Submissions which they were not highlighting but relying upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it**

must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

8. It did appear to this court that the issues that had been placed before it for determination were really:-

a. **Whether the *voire dire* examination was properly conducted;**

b. **Whether or not the Prosecution had proved its case beyond reasonable doubt;**

c. **Whether or not the Learned Trial Magistrate considered the Appellant's defence and submissions before convicting him.**

9. The court therefore dealt with the said issues under the separate heads shown hereunder.

1. **PROOF OF THE PROSECUTION'S CASE**

A. ***VOIRE DIRE* EXAMINATION**

10. Ground of Appeal No (1) of the Amended Grounds of Appeal was dealt with under this head.

11. The Appellant submitted that the *voire dire* examination was not conducted in accordance with Section 19 and 19 (1) of the Oaths and Statutory Declarations Act as the Learned Trial Magistrate did not record the questions he posed to the Complainant, L M (hereinafter referred to as "PW 1") or if she understood the meaning of taking an oath.

12. On its part, the State submitted that the Learned Trial Magistrate conducted the *voire dire* examination personally and satisfied herself that PW 1 understood the meaning of speaking the truth and there was therefore no defect in the said examination. It placed reliance on the provisions of Section 19 of the Oaths and Statutory Declarations Act and the case of **Julius Kiunga M'Birithia vs Republic [2013] eKLR** in this regard.

13. In the case of **Kivevelo Mboloi vs Republic [2013] eKLR** , Korir J outlined the guidance of the Court of Appeal in the case of **Johnson Muiruri vs Republic [2013] eKLR** in which it was stated as follows:-

> **"We once again with to draw attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiune, Criminal Appeal No 77 of 1982(unreported) we said:**
>
> **"Where in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination , whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if it is the opinion of the court he is possessed of sufficient intelligence and understands the duty of talking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (sec.19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions."…"**

14. Though there is great emphasis that actual questions and answers during the *voire dire* enquiry be recorded, it was the view of this court that it is a strongly recommended practise or procedure to avoid an appellate court making assumptions of the questions asked by a trial court and answers given to it by a minor as was observed in the case of **Peter Kariga Kiune, Criminal Appeal No 77 of 1982** (Supra) cited in the case of **Johnson Muiruri vs Republic** (Supra).There was, however, no legal requirement that the

same must be done or that if the same is not done, it will prejudice an accused person during trial, unless of course the same causes actual prejudice to an appellant.

15. Bearing in mind that the recommendations in the said case were made prior to the promulgation of the Constitution of Kenya, 2010 and that the provisions of Article 159(2)(d) of the Constitution mandates courts to administer justice without undue regard to technicalities, in the mind of this court, it is sufficient if from the way the proceedings have been recorded in a narrative form, it is abundantly clear that a child witness testifies that he understands the importance of saying the truth and his knowledge of what an oath is before the oath is administered. Where a minor has no knowledge of what an oath is, the trial magistrate must clearly set the same out.

16. In both instances, the trial magistrate must also clearly record that the child is possessed of sufficient intelligence to adduce the evidence before giving his opinion of how the evidence shall be adduced, that is, whether the same shall be sworn or unsworn. Additionally, the trial magistrate must record the minor's answer of the consequences of not telling the truth to enable the appellate court determine whether or not the *voire dire* examination was properly conducted.

17. Where a trial court opts to record answers only, then it is incumbent upon it to record the questions asked as well. If the above steps are followed, then the *voire dire* enquiry will be deemed to have been in compliance of the provisions of Section 19 of the Oaths and Statutory Declarations Act failing which the trial can only be deemed to have been defective and a nullity.

18. A perusal of the proceedings from the Trial Court shows that the Learned Trial Magistrate conducted a *voire dire* examination and recorded as follows:-

> **"I am L M. I am 6 years old. I was born in 2006. I attend [particulars withheld] Primary School. I am in standard 1. I attend Gospel Church at Mwatunge. We are taught to say the truth at Church. We are also told that those who tell lies will be burnt by God. I live with my mummy at home and daddy lives at work. My father is called D and my mother is called M.**
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> **Court: Child is a competent witness and can take an oath."**

19. It is evident that the Learned Trial Magistrate conducted a *voire dire* examination and established that PW 1 had sufficient intelligence and understood her duty of telling the court the truth. However, she did not seek to know whether PW 1 understood the meaning of taking an oath before administering the same. In the mind of this court, this was a substantive technicality that could not be ignored.

20. Indeed, the requirement of a child witness confirming that he or she understands the meaning of taking an oath is paramount because as can be seen in the case of **Johnson Muiruri vs Republic** (Supra), such evidence will not need corroboration for an accused person to be liable for an offence. The converse is also true, that an accused person cannot be found liable on such evidence unless the same is corroborated by material evidence.

21. In her Judgment, the Learned Trial Magistrate stated that she had carefully examined the demeanour of both PW 1 and her sister P W M (hereinafter referred to as "PW 2") and concluded that though they were minors, they were not coached on what to say and therefore their evidence was competent.

22. This court looked at PW 2's evidence and noted that she did corroborate PW 1's evidence. Unfortunately, just like in the case of PW 1, the Learned Trial Magistrate did not ask her if she knew the meaning of taking an oath before she administered the same to her. Whilst this court had no doubt in its mind that a child age fourteen (14) years would more often than not know the meaning of taking an oath and would be a competent witness, there is danger in not asking such a witness if she understands the meaning of taking an oath as she is still a minor.

23. Notably, in the case of **Maripett Loonkomok v Republic [2016] eKLR,** the Court of Appeal sitting in Mombasa rendered itself as follows:-

> **"…that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for *voir dire* examination. It follows from a long line of decisions that *voir dire* examination on children of tender years must be conducted and that failure to do so does not *per se* vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;**
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> ***"In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction.""***

24. The present case was one of attempted incest. This meant that no visible physical evidence could be detected. As a result, no P3 Form was tendered in evidence and no doctor testified, a position that was rightly observed by the Learned Trial Magistrate in her Judgment. There was therefore need for PW 1's evidence to have been corroborated by some other material evidence. However, as can be seen hereinabove, the evidence of PW 2 who was aged fourteen (14) years at the time of Trial could not corroborate her evidence for the reason that there was also a substantive procedural flaw in the manner in which her *voire dire* examination was conducted.

25. In the circumstances foregoing, Amended Ground of Appeal No 1 was merited and the same is hereby upheld.

CONCLUSION

26. Accordingly, having considered the Appellant's Amended Grounds of Appeal, his Written Submissions and those of the State and the case law it relied upon, it was this court's view that from the manner in which the *voire dire* examinations of PW 1 and PW 2 were conducted, the technicalities relating to the same were not of the calibre that could be excused under the provisions of Article 159(2)(d) of the Constitution of Kenya.

27. Indeed, as an accused person's right to fair trial is also enshrined in Article 50 of the Constitution of Kenya, courts must not only look at the victim only. They must also take into account the rights of such accused person as the sword of justice cuts both ways.

28. There was no doubt in the mind of this court that a Re-trial would be a good option to cure the irregularities by the Trial Court. However, a re-trial is not ordered as a matter of course. It depends on the particular circumstances of a case.

29. In this regard, this court fully associated itself with the holdings in the cases of **Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481** and re-stated in **Fatehaji Manji vs Republic [1966] E.A. 343** that Mutende and Thuranira Jaden JJ cited in the case of **Jackson Mutunga Matheka vs Republic [2015] eKLR** where it was stated as follows:-

> **"… a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence of for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused."**

30. Notably, the Learned Trial Magistrate stated in her Judgment that the Appellant had earlier pleaded guilty to the Charge and sentenced but was later given a reprieve by Muya J who ordered a Re-trial on

account of a technicality. There was no indication what this technicality entailed. This court can only state for a fact that if a re-trial was ordered, it was not due to the fault of the Appellant.

31. If this court was to order a Re-trial, it would be the third time that the Appellant herein would be facing a trial. Putting him through another trial for no fault of his would definitely occasion him injustice. Further, he has since been incarcerated for slightly more than three (3) years.

32. Undoubtedly, an offence was said to have been committed. However, as there was no documentary evidence, there was a very high likelihood that PW 1 might not be able to recall the details of that day which occurred six (6) years ago. She was aged four (4) years at the time. Indeed, in her evidence she had testified that the Appellant did nothing. Whether this piece of evidence would change is a matter of probability.

33. It is because of the foregoing reasons that this court found that although a re-trial would ordinarily have been ordered in a case where errors or omissions have been made by a trial court such as those that were made by the Learned Trial Magistrate, this was not a good case to order such re-trial.

DISPOSITION

32. The upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 12th November 2013 partially succeeded. It would therefore be unsafe to allow his conviction to stand. The same is hereby quashed. Consequently, the sentence is also hereby set aside.

33. This court hereby orders that he be set free forthwith unless he be held or detained for any other lawful reason.

34. It is so ordered.

DATED and **DELIVERED** at **VOI** this **20TH** day of **DECEMBER** 2016

J. KAMAU

JUDGE

In the presence of:-

David Musya Mulwa…..Appellant

Miss Anyumba………… for State

Josephat Mavu– Court Clerk